

MEMORANDUM FOR:

STAT

STAT

- These were copied from Industrial
Security Regulation, DOD 5220.22-R, dated
January 1981.

STAT



1-12-82

Date

FORM 5-75 101 USE PREVIOUS EDITIONS

indicated, a full report shall be made to the DUSD(Policy Review), ATTN: DSP&P. The DISCO shall be advised promptly of such action by submission of a DIS Form 553.

2-122 Appeals Not Authorized

In the following cases, denial or revocation of a facility security clearance is taken exclusively by the DIS; appeals to the DUSD(Policy Review), ATTN: DSP&P, are not authorized.

a. Involving research, development, and production of COMSEC or SENSITIVE COMPARTMENTED INFORMATION equipment or information.

b. Involving denial or revocation of a facility security clearance for a contractor or prospective contractor based on grounds of an overall security evaluation of unsatisfactory, or upon conditions which constitute an immediate danger of compromise of classified information.

c. Involving failure of the contractor to obtain a personnel security clearance for or to exclude a representative of a foreign interest.

d. Involving contractors under Type A and D listings in the Joint Consolidated List of Debarred, Ineligible and Suspended Contractors provided the

cognizant security office has taken the action required by paragraphs 2-111g and 2-118g, this regulation.

2-123 Reprocessing of a Facility Security Clearance That Has Been Revoked

a. If a facility security clearance has been revoked for the reasons set forth in paragraph 2-121f, and the cognizant security office considers that there are new circumstances which warrant granting a facility security clearance, recommendations shall be made to the Director DIS. Upon approval, a new facility security clearance shall be granted by the cognizant security office.

b. If a facility security clearance has been denied or revoked as a result of action taken by DISCR and the cognizant security office considers that there are new circumstances which warrant the granting of a facility security clearance, recommendations shall be made through DISCO to the DUSD(Policy Review), ATTN: DSP&P. This procedure does not authorize the cognizant security office to grant a facility security clearance in such case, pending final action under the Industrial Personnel Security Clearance Program.

Part 2. U.S. FACILITIES THAT ARE FOREIGN OWNED, CONTROLLED OR INFLUENCED

2-200 Application

This Part establishes the criteria for determining whether facilities located within the U.S., Puerto Rico, and a U.S. possession or trust territory are under FOCI when examining their eligibility for a facility security clearance. This Part outlines the procedures and practices to be followed in making this determination.

2-201 General Policy

a. Except as prescribed in paragraph c below, facilities which are determined to be under FOCI shall be ineligible for a facility security clearance.

b. A facility will be considered to be under FOCI when the degree of ownership, control or influence from a foreign source is such that a reasonable basis exists for concluding that compromise of classified information may result.

c. In the case of those facilities where the FOCI stems solely from a Canadian, U.K., or FRG source, the following applies:

(1) The procedures outlined in this Part shall be followed if it appears to the cognizant security office,

that pursuant to these procedures the determination will be that the facility is not under FOCI.

(2) The procedure outlined in paragraph 2-117 shall be followed, in lieu of this Part, if it appears to the cognizant security office, that pursuant to this Part the facility will be found ineligible for a facility security clearance because of FOCI.

2-202 Criteria

The following factors, applicable to all forms of business organizations, including colleges and universities, shall be considered in arriving at a determination:

a. Foreign interest ownership or beneficial ownership of five percent or more of the organization's securities.

b. Organizational ownership of any foreign interest in whole or in part.

c. Organizational positions held by foreign interests such as directors, officers or executive personnel.

d. Foreign interest control or influence or are in a position to control or influence the election, appointment, or tenure of directors, officers, or executive personnel of the organization.

DoD 5220.22-R

e. Organizational contracts, agreements, understandings or arrangements with a foreign interest(s).

f. Organizational indebtedness to foreign interests.

g. Organizational income derived from Communist countries or income in excess of 10 percent of gross income from non-Communist foreign interests.

h. Five percent or more of any class of the organization's securities are held in "nominee shares" in "street names" or in some other method which does not disclose the beneficial owner of equitable title.

i. The organization has interlocking directors with foreign interests.

j. Citizens of foreign countries are employed by or who may visit the facility(s) in a capacity which may permit them to have access to classified information (excluded are cleared immigrant aliens).

k. The organization has other foreign involvement not otherwise covered.

2-203 Procedures

a. If any of the factors outlined in paragraph 2-202 are present, the facility may not be issued a facility security clearance by the cognizant security office except as provided for below. The cognizant security office may issue a facility security clearance in the following types of cases provided there is a favorable finding by the Director of Industrial Security and provided further the elements of FOCI do not stem from a Communist country. The types of cases where this authority is delegated are:

(1) If the foreign interests own or have beneficial ownership in less than five percent of the contractor's voting stock and such minority holdings do not enable the foreign interest to control the appointment and tenure of any of the contractor's OODEPs or otherwise exercise control or influence.

(2) If the interlocking directorate which exists with a foreign interest pertains only to a firm which is represented by (i) a cleared OODEP of the U.S. contractor or (ii) an official of the U.S. contractor who does not require access to classified information, provided the firm certified that such official can be effectively excluded from access and does not occupy a position that would enable him to affect adversely the contractor's policies or practices in the performance of classified contracts for the User Agencies.

(3) If licensing, patent, sales or trade secret agreements exist or are entered into with any foreign interest, including a subsidiary of the contractor, the contractor's SPP includes adequate provisions to insure that representatives of the foreign interest who are parties to such agreements shall be effectively denied access to all classified records, information, and material and to controlled areas. In all such cases the contractor shall be informed of his obligation to

comply with the State Department's ITAR as it pertains to such agreements with foreign interests. However, if because of the nature or the number of licensing agreements with foreign interests, the cognizant security office concludes that the facility may be under FOCI, within the meaning of paragraph 2-201b, a facility security clearance shall not be issued, and the case shall be referred to the Director DIS, ATTN: Director for Industrial Security through the Region Director in accordance with paragraph b, below.

(4) If financial support from foreign sources consists only of income from non-Communist countries and does not exceed 10 percent of gross income.

b. All cases, except as provided for in paragraphs a(1) through (4) above, shall be referred to the Director DIS, ATTN: Director for Industrial Security for determination as to eligibility for a facility security clearance. The facility case file shall be documented to set forth the elements of FOCI, and, in addition, shall contain the contractor's proposed plan of action designed to divest itself of the FOCI or a notation that the facility does not desire to submit such a plan. The case file shall also contain the cognizant security office's evaluation, and recommendation and opinion of counsel. If legal advice is required in the processing of the case, the Director of Industrial Security should consult with the office of counsel of the DCASR servicing the area.

c. The Director, DIS, will cause a review to be made of the case. Based upon the review, the Director, DIS, will make a determination as to whether the facility is under FOCI. This authority may be delegated to the Director for Industrial Security HQ DIS, (or his Deputy), except however, in the following categories of cases the authority may not be delegated.

(1) Stock ownership by foreign interests in excess of 20 percent.

(2) Stock ownership by foreign interests where a Voting Trust Agreement is necessary to isolate the cleared facility.

(3) Foreign indebtedness exists amounting to 15 percent or more of the net assets of the corporation, or where over four percent of the stock in the U.S. corporation has been pledged as collateral, or foreign interests have options to acquire stock.

(4) More than five percent income is derived from Communist countries.

d. In any case where there is a reasonable doubt as to whether the degree of FOCI is such that a reasonable basis exists for concluding that compromise of classified information may result, the Director, DIS, shall forward the case with appropriate recommendations to the DUSD(Policy Review), ATTN: DSP&P for final determination.

and an acceptable solution cannot be expected within 60 days of original notification will be reported immediately to the Director DIS, ATTN: Director for Industrial Security. Reports concerning currently cleared facilities will include a recommendation whether the notification action specified in paragraph 2-118k should be taken.

f. In cases involving parent subsidiary organizations initial action under this Part shall be taken by the cognizant security office which has been assigned security cognizance of the parent organization. The processing of a subsidiary organization for a facility security clearance should not be delayed pending the outcome of the clearance determination for the parent organization. A facility security clearance shall not, however, be granted to the subsidiary until and unless a facility security clearance is first granted to the parent organization, or the parent is excluded after the parent has been determined not to be under FOCI. In cases involving a multiple facility organization, action under this Part shall be taken by the cognizant security office which has security cognizance of the HOF of the firm. Separate action is not required under this Part to determine eligibility for a facility security clearance of any other facility of the multiple facility organization.

g. The cognizant security office may, at any time suggest to the facility methods that may be employed to remove or nullify the effect of FOCI. If management adjusts to comply with the suggestions, the case may be further considered.

2-204 Assistance

Whenever requested by the contractor or on receipt of the report required by paragraph 6a(4)(f), ISM, the cognizant security office or the Director for Industrial Security, HQ DIS, as appropriate, will provide to the contractor, in writing, the DoD policy regarding FOCI as contained in paragraphs 2-201 and 2-202, and will consult with the contractor as needed to provide additional advice and guidance concerning the effect of FOCI. On request, the cognizant security office or the Director for Industrial Security, HQ DIS, as appropriate, may discuss procedures or methods which the contractor may elect to employ to counteract the effect of FOCI. If not previously involved, the Director for Industrial Security, HQ DIS, should be consulted and should participate in the matter whenever this expanded participation is indicated by the facts. Documents relating to these discussions and reports made pursuant to the foregoing are presumptively proprietary when appropriately marked by the contractor and will be protected from unauthorized disclosure and

handled on a strict need-to-know basis. When such reports are submitted in confidence, exemptions to the Freedom of Information Act, to the extent applicable, will be invoked to withhold them from public disclosure. Such reports will be marked "FOR OFFICIAL USE ONLY."

2-205 Trust Agreements

A facility which is under FOCI may become eligible for a facility security clearance only if the foreign interests can be effectively isolated. In the case of foreign ownership, this may be possible by establishing a Voting Trust Agreement. In such cases, the foreign stockholder(s) must not only transfer legal title of foreign-owned stock to the trustees, but more importantly all management prerogatives flowing from stock ownership must also be conveyed to the trustees. The Voting Trust arrangement must unequivocally provide for the absolute exercise of all prerogatives of ownership with complete freedom to act independently without consultation with, interference by, or influence from foreign stockholders. Except, however, the trust agreement may limit the authority of the trustees by requiring that approval be obtained from the foreign stockholder(s) with respect to: (i) the sale or disposal of the corporation's assets or a substantial part thereof; (ii) pledges, mortgages or other encumbrances on the capital stock which they hold in trust; (iii) corporate mergers, consolidations, or reorganizations; (iv) the dissolution of the corporation; and (v) the filing of bankruptcy petitions. The trustees must assume full responsibility for the voting stock and for exercising all management prerogatives relating thereto in such a way as to insure that the foreign stockholders, except for the approvals just enumerated, will be totally and effectively isolated from the cleared facility and continue solely in the status of beneficiaries. The facility must be organized, structured and financed so as to be capable of operating as a viable business entity independent from the foreign stockholders. The trustees must:

- (1) Be responsible U.S. citizens residing within the U.S., and be capable of assuming full responsibility for voting the stock and exercising the management prerogatives relating thereto in such a way as to ensure that the foreign stockholders will be effectively isolated from the cleared facility.
- (2) Be completely disinterested individuals without prior involvement with either the facility or the foreign interests.
- (3) Be eligible for and issued a personnel security clearance to the level of the facility security clearance. Should the trustee designate a proxy to vote on his behalf, the designated proxy shall be one of the

DoD 5220.22-R

other trustees. There shall be a minimum of three trustees for each Voting Trust Agreement. When a vacancy occurs, a successor trustee shall be appointed by the remaining trustees. Prior to being accepted as trustees by the Director DIS, the trustees must be advised in writing by the cognizant security office of the responsibility they are undertaking on behalf of the U.S. Government to totally isolate the cleared facility from the foreign interests. Moreover, the trustees must indicate in writing their willingness to fully accept this responsibility.

2-206 Utilization of Facilities

a. FOCI facilities located within the U.S., Puerto Rico, and a U.S. possession or trust territory determined to be ineligible for a facility security clearance under the procedures established in this Part may be utilized as a source of either material or services. However, if the release of classified information is required, a condition precedent to such utilization is a finding by the Head of the User Agency concerned that there is an impelling necessity therefore and that no clearable facility capable of providing the required material or service is available within time limitations considered militarily or operationally necessary. The authority to make this finding shall not be delegated below the Assistant Secretary or comparable level of the User Agency. The word "capable"

as used in this paragraph shall include no consideration of the elements of cost.

b. Where a finding is made, as provided in paragraph a, above, and a release is authorized, such access is beyond the scope of the Defense Industrial Security Program and shall not constitute a facility security clearance nor authorize the disclosure of classified information on a continuing basis, except as it relates to the particular finding, nor shall such release be binding on any other User Agency.

c. The action by one User Agency as outlined in paragraph a, above, does not constitute the authorization to release classified information pertaining to any other User Agency. If the classified information to be released pertains to more than one User Agency, authorization from the Head of such User Agency is required prior to the disclosure.

2-207 Effects of This Part on Prior Facility Security Clearances

The procedures established in this Part shall be applicable in those cases where previously facility security clearances have been granted. Facilities which fail to qualify under the foregoing provisions shall have their existing facility security clearances revoked.

2-208 Appeals

Actions taken under this Part are not appealable.

Part 3. PERSONNEL SECURITY CLEARANCES AND DENIALS FOR CONTRACTOR PERSONNEL

2-300 Application

This Part establishes policy and procedures for the granting of personnel security clearances for U.S. contractor personnel, including immigrant aliens, security assurances for U.S. citizens in Canada, the U.K., or the FRG and security assurances for Canadian U.K. or FRG citizen employees of U.S. contractors, and for the granting of access authorizations to NATO classified information. In addition, this Part sets forth procedures for the recommendation for suspension, revocation or denial of personnel security clearances.

2-301 Security Clearances for Personnel

a. *General.* A personnel security clearance is an administrative determination that an individual is eligible, from a security point of view, for access to classified information of the same or lower category as the level of the personnel security clearance being granted. A personnel security clearance granted by the DoD or by a contractor for access to classified information is valid for access to classified informa-

tion of the same or lower category. A personnel security clearance (or an interim personnel security clearance) is required for contractor personnel prior to granting them access to classified information. Personnel shall not be cleared for access to classified information of a higher category than the level of security clearance of the facility at which they are employed except—

(1) Consultants, as provided for in paragraph 2-106.

(2) Employees of a multiple facility organization (including those employed or physically located at uncleared facilities) who (i) require access to a higher category of classified information in connection with the performance of their duties at another cleared facility or at a Government installation, or (ii) are transferred to an uncleared facility or to a facility with a lower level of clearance within the multiple facility organization, provided the contractor desires to retain the Letter of Consent at the higher level so it will be available in the event of a transfer to a facility with a lower level of clearance.